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In The
Supreme Court of the United States
October Term, 1996

BERNADINE SUITUM,
Petitioner,

vs.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS* AMERICAN HOMEOWNERS FOUNDATION AMERICAN LAND RIGHTS ASSOCIATION IN SUPPORT OF PETITIONER

Nancie G. Marzulla**
Lisa M. Jaeger
DEFENDERS OF PROPERTY RIGHTS
6235 33rd St. NW
Washington, DC
20015-2405
(202) 686-4197

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** Counsel of Record

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BRIEF *AMICI CURIAE* OF
AMERICAN LOGGERS SOLIDARITY
CITIZENS AGAINST REPRESSIVE ZONING
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS, INC.
CREATIVE REAL ESTATE MAGAZINE
DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION
DEFENDERS OF PRIVATE RIGHTS
FARM CREDIT PROPERTY RIGHTS FOUNDATION
ENVIRONMENTAL CONSERVATION ORGANIZATION (ECO)
FRONTIERS OF FREEDOM
HEARTLAND INSTITUTE
HILL COUNTRY HERITAGE ASSOCIATION
HILL COUNTRY LANDOWNERS' COALITION
MAINE CONSERVATION RIGHTS INSTITUTE
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES
NATIONAL ASSOCIATION OF MANUFACTURERS
NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS
NATIONAL CENTER FOR POLICY ANALYSIS
NATIONAL COALITION FOR PUBLIC LANDS AND NATURAL RESOURCES
NORTHWEST LEGAL FOUNDATION
OREGONIANS IN ACTION LEGAL CENTER
PEOPLE FOR THE WEST! ACCORD CHAPTER
PUTTING PEOPLE FIRST
TAKE BACK ARKANSAS, INC.
TEXAS JUSTICE FOUNDATION
and TRANS TEXAS HERITAGE ASSOCIATION
IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Whether the granting of the potential to transfer one percent of the right to use a building lot (for which the owner has been denied all beneficial and productive use), renders the taking claim not ripe for adjudication?

2. Whether the Fifth Amendment's mandate of "just compensation" is satisfied by the granting of transfer development rights instead of monetary compensation?

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Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of Petitioner.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders of Property Rights engages in litigation across the county affecting the public interest and the private property rights of its membership to vigorously protect those rights considered essential by the framers of the Constitution.

American Homeowners Foundation (Arlington, VA) is a nonprofit educational and research organization serving the nation's sixty-five million homeowners. The Foundation's mission is to educate homeowners and prospective homeowners and to protect and advance home ownership.

American Land Rights Association (Battle Ground, WA) is a non-partisan grassroots coalition of farmers, ranchers, private property owners, rights holders, loggers, miners, and outdoor recreation advocates in or near federally managed areas or who are affected by federal land use or environmental laws and regulations.

American Loggers Solidarity (Forks, WA) is a broad-based, grassroots organization made up of individuals, small

businesses, corporations and elected officials at the city, county and state level in seven states.

Citizens Against Repressive Zoning (Haslett, MI) works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

Citizens For Constitutional Property Rights, Inc. (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees provided in the Bill of Rights.

Creative Real Estate Magazine (Rancho Santa Fe, CA) publishes "How-To Journal For Anyone Who Wants To Make Money in Real Estate," sold by subscription nationwide for over twenty-five years.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas.

Defenders of Private Rights (Baker City, OR) is dedicated to the defense of private rights as envisioned by the Founding Fathers, and portrayed in the U.S. and Oregon Constitutions, as originally written.

Farm Credit Property Rights Foundation (Austin, TX) is a non-profit educational and research organization formed to further the efforts of protection of property rights through litigation and legislation. It promotes coordination among property rights groups to find common strategies to preserve Fifth Amendment guarantees as intended by the Founding Fathers.

Environmental Conservation Organization (ECO) (Hollow Rock, TN) represents more than 500 local, state, regional and national organizations that promote free-market alternatives to regulatory environmental protection.

Frontiers of Freedom (Arlington, VA) is a grassroots membership organization founded to promote the basic ideas of the Founding Fathers as articulated in the Constitution to ensure the maximum amount of freedom for every American.

Heartland Institute (Palatine, IL) is a nonprofit public policy research organization serving the nation's federal and state elected officials, journalists, Heartland Members and other opinion leaders.

Hill Country Heritage Association (Lampasas, TX) embraces the conservation of natural resources in conjunction with respect for individual property rights.

Hill Country Landowners' Coalition (Georgetown, TX) was organized in 1991 to oppose over-regulation of private property.

Maine Conservation Rights Institute (Lubec, ME) is dedicated to private property rights and private conservation, through education and research.

National Association of Industrial and Office Properties (Herndon, VA) is a professional organization of 5,000 individuals engaged in owning, managing, and developing industrial and office buildings in the United States and internationally. Its members include the nation's leading commercial real estate developers, and also architects, brokers,

master planners, engineers, property managers, banks, insurance companies, and other real estate financial groups.

National Association of Manufacturers (Washington, DC) is the nation's oldest and largest broad-based industrial trade association. Its 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ eighty-five percent of all manufacturing workers and produce eighty percent of the nation's manufactered goods. More than 158,000 businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

National Association of Reversionary Property Owners (Issaquah, WA) is a nonprofit foundation whose major goal is to assist property owners to maintain their complete land ownership and resist government confiscation.

National Center for Policy Analysis (Dallas, TX) seeks to develop and promote private alternatives to government regulation and control, solving problems by relying on the strengths of the competitive, entrepreneurial private sector.

National Coalition for Public Lands and Natural Resources (Pueblo, CO) represents 23,000 grassroots activists across the country and advocates common sense environmentalism including the protection of private property rights.

Northwest Legal Foundation (Minot, ND) exists expressly for the purpose of protecting the rights of individuals, especially real property rights, against the invasion of those rights by governmental actions.

Oregonians In Action Legal Center (Tigard, OR) is a nonpartisan, nonprofit, public interest law center involved in litigation seeking to protect the constitutional rights of landowners and counter excessive land use regulation.

People for the West! ACCORD Chapter (Phoenix, AZ) is a grassroots organization created to support western communities against the overreaching hand of government.

Putting People First (Helena, MT) is a nonprofit organization of citizens who support a return to common sense in man's relationship with nature and civility among men.

Take Back Arkansas, Inc. (Fayetteville, AR) is a private property rights organization whose goal is to organize like-minded people at the grassroots level and provide information about property rights.

Texas Justice Foundation (San Antonio, TX) is a nonprofit, public interest, litigation foundation that seeks to protect individual rights, limit government to its appropriate role, and promote a better business climate in Texas.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowners rights. Its members collectively own over fifteen million acres of land in Texas and other states.

STATEMENT OF THE CASE

In 1972, Petitioner Mrs. Bernadine Suitum and her late husband acquired an 18,300 square foot building lot in a developed, residential subdivision located in Incline Village, Nevada. In 1989, Petitioner submitted a building permit application with Respondent Tahoe Regional Planning Agency (TRPA) seeking permission to build a house on the lot. Respondent denied the building permit application because in 1987 Petitioner's land had been included in a "Stream Environment Zone" (SEZ).

The regional plan which prohibits any "new land coverage or other permanent land disturbance" a SEZ, rendered Petitioner's land ineligible for development. However, under the regional plan, owners of property in a SEZ are eligible through a lottery system for certain transferable development rights (TDR's). In the instant case, Petitioner is potentially eligible to transfer development rights of 183 square feet, subject to Respondent approval. But as the trial court concluded as to Petitioner's lot: "The Court understands that plaintiff may not develop or build on the parcel of land she owns and that no developmental rights may be transferred *to* the property at issue." Pet. App. at D3 (emphasis in original).

After exhausting her administrative remedies, Petitioner filed suit in the United States District Court for the District of Nevada, alleging Respondent had taken her property rights without payment of just compensation under

color of state law in violation of 42 U.S.C. § 1983, and the Fifth and Fourteenth Amendments to the United States Constitution.

The district court awarded summary judgment in favor of Respondent on the ground that the case was not ripe for adjudication because Petitioner had not attempted to transfer her development rights to which she may be eligible under the TDR program.

The court below affirmed the district court decision on the ground that a TDR is a "use" of property, and because that use had not been exercised, Petitioner's case was not ripe for review.

SUMMARY OF ARGUMENT

In 1922, Justice Holmes wrote what turned out to be the prophetic warning regarding the government's seemingly insatiable appetite to acquire constitutionally protected property rights without payment of just compensation:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without just compensation... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 394, 415 (1922).

The case at bar represents nothing less than the government's latest attempt to evade its constitutional duty to pay for the property that it has taken.

In 1992, this Court announced the principle that governs the issue posed in the instant case:

> When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992).

The instant case is exactly like the case presented for review in *Lucas*, with one exception. In both *Lucas* and the instant case, the government has precluded the property owner from building a house on an otherwise buildable lot; in this case, however, the government has also told Petitioner that she has the right to enter into a lottery process whereby she can potentially transfer a development right equal to one percent of the square footage of that lot to someone else's lot somewhere. Petitioner does not own another lot nor is she interested in trying to market the development rights to other owners with the hope that they can put together enough development rights to build a house on some other property.

The ability to transfer a percentage of development rights does not constitute a use of the subject property at all. Thus, the existence of transferable development rights (TDR's) in this case does not change the conclusion that Petitioner's property rights have been taken. The

promulgation of the "Stream Environment Zone" now means that Petitioner can make absolutely no beneficial or productive use of her building lot, a right which background principles of property law would otherwise dictate that she possess.

In light of the fact that a *per se* taking occurred in this case at the point at which Respondent told Petitioner that she could make no productive or beneficial use whatsoever of her building lot, the court below's holding that the case was not ripe for adjudication is simply untenable.[1] Indeed, as this Court explained in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), the reason for the rule that a claim for just compensation is not ripe for review until the property owner had obtained a "final decision" from the administrative agency is to ensure that the court can determine *"how the regulations will be applied to respondent's property." Id.* at 200 (emphasis added).

In short, the takings inquiry focuses on the land regulated and the associated ownership rights. In the instant case, there is no question that the regulated lot is off-limits to development due to its inclusion in the Stream Environment

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[1] The court below held that the damages claim for violation of the government's obligation to pay just compensation was not ripe for adjudication, explaining:

> We have previously noted that there are "two independent hurdles to the filing of a [regulatory] taking claim in federal court against a state or local government." . . . Only the first, known as the "final decision requirement," is at issue in this case and it requires Suitum to show that before filing suit, she sought a "final decision from [TRPA] regarding the application of the regulation to the property at issue."

Pet. App. at A-8.

into her ability to utilize *that lot* would render a different result. *First English,* 482 U.S. at 321 (holding that government may not avert just compensation requirement where a taking has already occurred).

Thus, just as this Court in *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 137 (1978), held the takings claim ripe for adjudication even though the government had made the developable air rights transferable to the owners' other buildings in Manhattan, likewise this Court should hold the instant claim ripe for adjudication and reverse the decision below.

Finally, the granting of a TDR to another piece of property does not satisfy the constitutional requirement of just compensation. This Court has repeatedly held that "just compensation" means payment of money damages for the fair market value of any property that has been taken. The government could not offer the property owner just anything of value such as a car, stock options, or a seat on the city council.[2] Therefore attempts to foist off on an unwilling property owner so-called equivalents -- regardless of how potentially valuable -- of just compensation for property that has been taken fail to pass constitutional muster. At best, as the *Penn Central* Court explained:

> While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law had imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

Id at 137.

Thus, the court below not only failed to apprehend the reality of the facts of this case, but it simply missed the point of the clear constitutional mandate that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Indeed, Justice Brennan's dissent in *San Diego Gas & Elect.Co. v. City of San Diego*, 450 U.S. 621 (1981) well applies to the case at bar: "This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: Once there is a 'taking,' compensation *must* be awarded." *Id.* at 654 (emphasis in original).

ARGUMENT

I. Once It Is Clear That A Property Owner Has Been Denied All Beneficial and Productive Use of Property, Compensation Is Owed For The Taking, And The Taking Claim Is Ripe For Adjudication.

The court below erroneously concluded that because Petitioner may have the right to transfer one percent of the use of her lot to another lot, that her taking claim was not ripe for adjudication. However, in a ripeness inquiry in the context of a zoning regulation, this Court only looks at the uses regarding

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[2] Indeed, given the fact that Respondent asserts that the TDR's do have a market value, it should sell the rights and use the proceeds to pay Petitioner the just compensation to which she is constitutionally entitled.

the property in question -- not on future uses of other land which the owner may or may not acquire. *Penn Central*, 438 U.S. at 136. In the leading case in this area, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), the Court looked exclusively at the ability of the property owner to use the land for which zoning had been denied, not at other land he may or may not own:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of *the type and intensity of development legally permitted on the subject property*. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes ... Until a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations *to its property*, it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interests have been destroyed . . .

Id. at 350 (emphasis added).

There is no question in this case regarding how far the SEZ regulations have gone. They have deprived Petitioner of all of her rights to make reasonable and beneficial use of her building lot. Pet. App. at D-3. Thus, under this Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a *per se* taking of Petitioner's property rights has occurred. Moreover, because Petitioner's property rights have been taken, Respondent is now obligated to pay just compensation for that taking. *First English Evangelical*

Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320 n. 10("Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time.").

The court below's holding would allow Respondent to evade its constitutional duty to pay just compensation through employment of the fiction that the right to potentially transfer one percent of the use of her building lot to another lot elsewhere is a "use" of the original lot.[3]

On its face, however, the ability to transfer development rights to another lot which Petitioner does not even own (and even if she did would not allow her to build a house because of the square footage she can potentially transfer) is not a use of the original lot. Rather, the holding below simply allows government -- through a TDR scheme -- to truncate the Fifth Amendment's guarantee of just compensation by employment of a fiction that a TDR is a "use" of the original lot.

Exactly a decade ago this Court faced a similar attempt by government to evade its constitutional duty to pay just compensation for the taking of private property. *First English* 482 U.S. 304 (1987). The state of California had argued in

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[3]We recognize that TRPA's regulatory scheme is unique and conclude within that scheme, transfer of development rights is a 'use' of SEZ property. . . . That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.
Pet. App. at A-19-10.

First English that the Fifth Amendment's just compensation clause was a mere condition upon the exercise of the power of eminent domain. By this logic, California sought to limit property owners' remedy for an uncompensated taking to invalidation of the offending statute. Thus, the California legal system simply defined away the just compensation remedy by declaring that there could be no uncompensated takings, only invalid regulations, thereby protecting and encouraging the proliferation of confiscatory zoning and land use regulation.

However, in *First English* this Court flatly rejected the "California rule," holding that the rule unconstitutionally truncated the Fifth Amendment right to a money remedy. *Id.* at 317. Most significantly, the Court reasoned that denying an owner compensation for all those years in which he held the property but was denied its full use would be a constitutionally inadequate remedy: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321.

This Court's refusal to allow government to avoid its constitutional duty to pay just compensation for the property that it has taken by engaging in subsequent actions to 'undo' the taking have most recently been rejected by this Court in *Lucas*:

> Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront

> Management Act. That there is a discretionary "special permit" procedure by which he may regain -- for the future, at least -- beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here.

Lucas, 505 U.S. 1003, 1012-13 (citations omitted).

Just as this Court refused to allow government to undo its taking by subsequent actions in *Lucas* and *First English*, so should this Court in the instant case refuse to allow Respondent to avoid its constitutional duty to pay for the property that it has taken by its TDR scheme regarding future property which Petitioner may or may not be eligible to acquire.

II. The Fifth Amendment Mandate of "Just Compensation" Is Not Satisfied By The Granting of Transfer Development Rights.

This Court long ago held that just compensation for the taking of private property means payment of money damages:

> The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of

> the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

In sharp contrast, this Court has never suggested, much less held, that TDR's can be forced on an unwilling property owner as a substitute for just compensation.[4] The Fifth Amendment itself contains no limitation or exception for its guarantee that when private property rights are taken for public use, just compensation must be paid to the owner. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987).

In *First English*, this court overruled the California line of cases that had disallowed damages incurred prior to the actual invalidation of a challenged ordinance. In so doing, this Court reaffirmed the basic proposition that "the [Fifth]

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[4] *Penn Central*, 438 U.S. 104 (1978), involved New York City's refusal to allow the property owner to construct an office building in excess of 50 stories atop one of the most historically significant buildings in the city -- Grand Central Station. Employing the well-known three-factor analysis, which entails analysis of the character of the government's action, economic impact of the regulation, and reasonable investment-backed expectations of the property owner, the Court reasoned that because Penn Central could still profit from ownership of the train terminal, and obtain a reasonable return on its investments, no taking had occurred. *Id.* at 136. In short, the posture of Petitioner's position vis-a-vis the offer of TDR's is in no way similar to that of the property owner in *Penn Central*. Moreover, the *Penn Central* Court had an independent basis for its conclusion that no taking had occurred, regardless of the fact that the TDR's may have offset the economic impact of the permit denial.

Amendment . . . is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" *Id.* at 315 *quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960)(emphasis in original). Thus, just as this Court flatly rejected the California rule that invalidation of a regulation that infringed private property rights could satisfy the just compensation requirement, so should this Court reject Respondent's attempt to circumvent the Constitution by use of TDR's.

Similarly, in *Jacobs v. United States*, 290 U.S. 13 (1933), this Court reviewed the constitutionality of a lower court's holding that interest was not recoverable on a property owner's claim for just compensation because the statute under which suit had been brought did not authorize the payment of interest. This Court rejected the lower court's conclusion that the constitutional rights to just compensation could be limited by statute:

> The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, "and no specific command to include interest is necessary when interest or its equivalent is part of such compensation." The owner is not limited to the value of the property at the time of the taking; he is "entitled to such addition as

> will produce the full equivalent of that value paid contemporaneously with the taking."

Id. at 16-17 (citation omitted).

By the same token, Petitioner in this case is also entitled to full compensation, not the inadequate grant of the potential to transfer one percent of the use of her property to someone else's lot. Although it may well be that the use of TDR's may be a legitimate way to offset the economic impact of the SEZ on Petitioner's property or a desirable way to obtain funds through the sale of such rights to pay Respondent's cost of paying damages for the taking, in no way can TDR's be seen as satisfying constitutionally required just compensation.

CONCLUSION

For all of the foregoing reasons, *amici curiae* urge this Court to reverse the decision below.

Respectfully submitted,

Nancie G. Marzulla
Lisa M. Jaeger
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd Street, N.W.
Washington, D.C. 20015
202-686-4197

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